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THE
Mercantile License Tax

AN INQUIRY

Is It Constitutional?

Who are Liable and How?

The Seven Remedies of the Citizen

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THE MERCANTILE LICENSE TAX.

The Mercantile License Tax

An Inquiry. Is It Constitutional? Who Are Liable, and How? The Seven Remedies of the Citizen.

BY

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Philadelphia

"By goode disputing the law shall be well knowne."—YEAR BOOK

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INTRODUCTION.

If some favorite child of manifest destiny in his native Philippine swamp should be told that today in the Commonwealth of Pennsylvania a particular officer of the government—and he not a legislative officer—may prescribe at his sole discretion a series of questions to be answered by every merchant or shopkeeper concerning the merchant's private affairs and compel the merchant to expose everything to certain agents of the law, as they are called, who may invade his store and counting-house, he might perhaps be puzzled to discern wherein lies the difference between the inquisitorial Spanish and the free American systems.

Were this special charge of Christian humanity told that another officer of the government—not a judicial officer—may require the merchant to appear before him with his private books and accounts, may make such inquiries and examinations as he sees fit and become the inquisitor and judge of all, he might be pardoned if he did not cry out for American freedom.

And were it known to our yellow fellow citizen that a merchant who declines to submit to these exactions and infringements of his natural rights is subjected to

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a penalty of one thousand dollars, it might be better understood why he has preferred the latter of the alternatives that a great American patriot proposed to himself—why he has chosen death rather than American liberty.

Yet this is the system attempted to be set up by the Mercantile License Tax Law of May 2, 1899.

Unequal,

Local,

Inquisitorial,

Tyrannical,

Infringing upon natural rights,

Interfering with the inviolability of private affairs,

Open to fraud and evasion,

Discriminating against the honest,

Productive of dishonesty,

Fostering the spirit of petty favoritisms and petty tyrannies of petty officials,

Arraying class against class.

If it be urged, in the language of European economists and statesmen, that these are practical questions for the economist and statesman to decide and not for the courts; and that when the finances of a state are in a bad way and require money relief, the end justifies the means; it may be answered that with us, under the American system, no power of government is untrammeled or unrestrained, and that there are principles dearer to the American heart and more jealously

guarded by the American judiciary—to their honor be it said—than the mere question of money-getting for a municipality or for a state.

This book is devoted

(1) To an inquiry whether the Legislature can constitutionally set up the odious and un-American system attempted to be set up by the Act of 1899.

2) To a short inquiry as to some of the features of the Mercantile Tax Law of the State without regard to the question of unconstitutionality.

(3) To an inquiry as to the remedies.

Under the first head will be considered:

I. Whether the taxation attempted to be imposed is uniform taxation.

II. Whether the Act is not a local or special Act.

III. Whether the Act is not a forbidden violation of private rights and a forbidden delegation of legislative functions.

IV. The question of the emoluments of officers under the Act.

V. Whether the Act does not contain more than one subject not clearly expressed in the title.

Under the second head will be considered:

I. Who is a vender or dealer.

II. Who is not a vender or dealer.

III. The law in regard to manufacturers or mechanics.

Under the third head will be considered:

The seven remedies of the citizen.

CONTENTS.

AN ACT

To provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares, and merchandise, and providing for the collection of said tax.

Section 1. Be it enacted, &c., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act to be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers.

Section 3. For the purpose of carrying into effect the provisions of this act, the appointment of mercantile appraisers shall be made annually, on or before the thirtieth day of December of each year, by the county commissioners, except

in cities of the first class, when the Auditor General and the treasurer of the city are authorized and required to appoint five suitable, qualified citizens, all of whom shall not be of the same political party, and the term of office of said appraisers shall be for three years.

Section 4. The Auditor General shall be authorized and required to prepare and have printed proper blanks, to be distributed by the mercantile appraisers in the several counties to each vender of or dealer in goods, wares and merchandise. These blanks shall be in the form prescribed by the Auditor General, and shall contain a request for such information as may be necessary in arriving at the actual amount of business transacted by the vender of or dealer in goods, wares and merchandise, during the calendar year preceding that for which a license is required. The blanks thus prepared shall contain an affidavit; and every dealer subject to the provisions of this act shall be required to make an affidavit, by oath or affirmation, as to the correctness of the return made. The whole volume of business, including cash receipts and merchandise sold on credit, which is thus ascertained has been transacted during the preceding calendar year, shall be the basis upon which the license is to be rated.

Section 5. It shall be the duty of each vender of or dealer in goods, wares and merchandise to fill up the blank prepared, as before said, by the Auditor General, and return the same to the mercantile appraiser of the proper county within ten days from the date of the receipt thereof, with an affidavit certifying to the correctness of the return so made. If any vender of or dealer in goods, wares and merchandise refuses to make a return, as required by this act, to the mercantile appraiser, when requested so to do, it shall be the duty of the mercantile appraiser to report the same immediately to the

county treasurer, whereupon it shall be the duty of the county treasurer to require the owner or business manager to appear before him in person, with the books and accounts of his mercantile establishment, for interrogation and examination; and the county treasurer shall have power to issue subpoenas and attachments, to be served by any constable or sheriff, and to compel the attendance of the owner, or any clerk, bookkeeper or officer connected with said business, to produce such books and papers as he may deem expedient to secure the information necessary to ascertain and fix the amount of business transacted during the calendar year preceding that for which a mercantile license tax is to be paid. After the county treasurer has ascertained, from the best evidence that can be secured, the amount or volume of business transacted during the calendar year preceding that to which the license is to be issued, he shall settle an account, in the usual mode, against the owner or owners of such establishments, for the amount of mercantile tax due under the classification hereinbefore provided. If the owner, proprietor, or any other person connected with the business, who is subpoenaed, refuses to produce the books and papers and appear before the county treasurer, for the purpose of giving the information required by this act of Assembly, he shall be liable to a penalty of one thousand dollars, to be collected in the manner provided by law. The county treasurer shall settle an account against the owner or owners, so neglecting or refusing to make the report as aforesaid, and a certified copy of said settlement shall be forwarded to the vender of or dealer in goods, wares or merchandise, which settlement, when so made, shall be subject to appeal for thirty days from the date thereof, and, if not appealed from within that time, it shall be final and conclusive. If an appeal is not taken as hereinbefore provided,

within the period authorized by law, it shall be the duty of the county treasurer of the proper county to proceed to collect the amount due, as mercantile taxes are in other cases collected.

Section 6. It shall be the duty of each mercantile appraiser, appointed under the provisions of this act, to forward by mail, at least ten days prior to the date when he makes a personal visit to the place of business of every person whom he is required by law to ascertain and assess, a blank prepared for distribution by the Auditor General as hereinbefore provided. It shall be the further duty of the mercantile appraisers, after mailing the blank as hereinbefore provided, in the several cities and counties of this State, personally to visit the store, or other place of business, of every vender of or dealer in goods, wares and merchandise, and, at the time of such visit, to require each vender or dealer to make a return, under oath or affirmation, of the goods sold for the preceding calendar year, on the blank forwarded, and he is hereby empowered to administer an oath or affirmation for that purpose. If the mercantile appraiser is dissatisfied with the return, so made by the vender or dealer, he shall ascertain and assess the mercantile license tax according to the classification so made. He shall also leave a written or printed notice, to be prepared and furnished by the Auditor General, specifying the classification and amount of license money to be paid by such person to this State, and also the time and place, when and where, an appeal will be held as required by law. The appeal shall be held by the county treasurer, acting in conjunction with the mercantile appraiser, at such date as shall conform with law in all counties, except where there is a board of mercantile appraisers, in which case the board shall hear all appeals. Any vender or dealer, subject to the pro-

visions of this act, who is dissatisfied with the rating so made by the mercantile appraiser, shall have the right of appeal to the mercantile appraiser and county treasurer, who are required to hear him on the day so fixed for the appeal; if the vender or dealer is still dissatisfied with the finding of the county treasurer and mercantile appraiser, or board of appraisers, in reference to the proper classification of said vender or dealer, he shall have the right of appeal to the court of common pleas of the proper county, which appeal the said court is required to hear and determine within twenty days after such appeal shall be taken, or at the next sitting thereof. If any person fails to attend the appeal before the county treasurer and mercantile appraiser, board of appraisers, or the court, he shall not thereafter be permitted, in a suit for the recovery of said mercantile license tax, to set up as a defence, either that he is not a vender of or dealer in goods, wares or merchandise, or any other ground of defence, which might have been heard and determined either by said county treasurer and mercantile appraiser, board of appraisers or the court of common pleas, on appeal, as aforesaid.

Section 7. It shall be the duty of every city and county treasurer to sue for the recovery of all licenses, duly returned to him by the mercantile appraiser, if not paid on or before the first day of July in each and every year, within ten days after that date: Provided however, That if the county treasurer is satisfied that the mercantile license tax, for any good and sufficient reason, cannot be collected, he shall make a report to the Auditor General of all the facts connected with the case, and the Auditor General, upon investigation, may exonerate him from the payment of said tax, and in all such cases suit shall not be brought. The county treasurer shall at the expiration of each month, forward to the State Treasurer the amount of mercantile tax received by him.

Section 8. Any mercantile appraiser who shall neglect or refuse to visit the store, or other place of business, of any person ascertained and assessed by him for license, and to furnish such person with a written or printed notice of his classification, amount of license, and time and place of holding appeal, as required by the fifth section of this act, shall pay a penalty of one hundred dollars, for the use of the Commonwealth, to be recovered as debts of a like amount are recoverable, on due proof of such neglect or refusal being made according to law.

Section 9. It shall be the duty of every mercantile appraiser, appointed under this act, on or before the first day of May, in each year, to certify to the county treasurer a correct list of all venders or dealers in goods, wares and merchandise, assessed or to be assessed with a mercantile tax in the county for which he is appointed, giving the names and postoffice addresses of the venders or dealers so returned, the classification, and amount of license due by each. The list furnished by the mercantile appraiser to the county treasurer shall not contain the name or names of venders or dealers who are not subject to the payment of the mercantile license tax. This list shall be kept by the county treasurer, for his guidance in hearing appeals and collecting said license taxes. After appeals have been heard and exonerations made, the corrected list shall then be certified by the county treasurer to the Auditor General, on or before the first day of July, of each year.

Section 10. The rate of commission allowed county or city treasurers, the fees collected for the county or city treasurers and mercantile appraisers, also the rate per mile paid mercantile appraisers, and all provisions of law with reference to the advertising of said lists, shall be and remain

the same as now fixed by existing law; and after such publication of advertisement shall have been properly made, it shall be the duty of the constable of his respective ward, district or township to compare the list, and report to the county or city treasurer all omissions found, and for such service the constable shall receive a fee of fifty cents for each and every omission so reported.

Section 11. Each dealer who comes under the provisions of this act shall cause to be placed, permanently, at the entrance of his or their place of business, a sign describing the business in which the party is engaged, with his or their name or names upon the same, such sign; and a violation of the provisions of this section shall be punishable with a fine of ten dollars, said fine to be collected as fines of like amount are now by the law collected, and to be paid into the county treasury.

Section 12. All acts or parts of acts, general, special or local, inconsistent herewith be and the same are hereby repealed.

Approved—The 2d day of May, A. D. 1899.

WILLIAM A. STONE.

Pamphlet Laws, page 184.

PART I.

THE CONSTITUTIONALITY OF THE ACT OF MAY 2, 1899.

I.

Is it Uniform Taxation?

Sections 1 and 2.

I.

While courts cannot review the wisdom or expediency of legislative enactments or the motives of their framers, they can pronounce enactments void which violate prohibitions, expressly declared or clearly implied, of the Constitution.

Does the Act of 1899 offend in this respect?

Is it unconstitutional?

Will the courts declare it or any part of it void?

When the city of Williamsport attempted to impose an occupation tax based upon the amount earned by each individual in his occupation, the Supreme Court said in 1885:

The assessment upon occupations is hopelessly, incurably vicious. The plain mandate of the Constitution has been wholly ignored. It is in direct violation of Article IX, Section 1, which provides that "all taxes shall be uniform upon the same class of subjects." The organic law requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform. Thus, in levying a tax upon occupations, a tax of $100 upon every person having a known occupation would be uniform. But what uniformity is there in laying an occupation tax of $100 upon A and a like levy of $200

upon B, the occupation of each being similar? The answer, and the only one that can be urged, is that B earns double the amount that A does. This brings us at once to the vice underlying the whole case. Under the guise of an occupation tax the city of Williamsport has levied and is seeking to collect an income tax. Of all forms of taxation this is the most odious to the American people. It was submitted to during the war from a feeling of patriotism in view of the great financial strain to which the country was subjected. But when no such cause exists there is little excuse for imposing such an obnoxious burden.

Bangor's Appeal, 109 Pennsylvania State Reports, 79 (1885).

Accordingly, when the city of Allentown imposed a license tax upon dealers, graduated by the estimated amount of their gross annual sales, a dealer, relying upon the decision in Bangor's Appeal, appealed to the courts, contending that the grading of the license tax according to the amount of the annual gross sales was illegal because not uniform. But the Court held that such a tax was

NOT A TAXING OF THE SELLER,

but

A TAXING OF HIS PROPERTY,

and that

Being a taxation of a thing, and not of a person, the classification makes uniformity the same as in the case of money at interest or real estate.

Allentown *vs.* Gross, 132 Pennsylvania State Reports, 319 (1890),
followed in

Williamsport *vs.* Wenner, 172 Pennsylvania State Reports, 173 (1896).

The first two clauses of the first section of the Act of 1899 are:

"Each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume gross of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise, shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one half mill additional on each dollar of the whole volume gross of business transacted annually."

This is a tax graduated by the estimated amount of gross annual sales.

It is therefore

NOT A TAXING OF THE SELLER,

but

A TAXING OF HIS PROPERTY.

As such it must stand or fall.

There is no doubt of the right of the Legislature to classify property as the subjects of taxation.

But all the members of each class must be treated alike.

Pittsburg *vs.* Coyle, 165 Pennsylvania State Reports, 61 (1894).

So, the Legislature may legally tax the property of merchants and shopkeepers and exempt the property of all other citizens, however unfair and unequal, and however dangerous to the political lives of the legislators such taxation may be.

But whether the Legislature may discriminate between the property of the wholesale and retail dealer in the same commodity and tax the property of the retailer twice what it taxes the property of the wholesaler, is a far different and, to say the least, a most doubtful question, especially in this day of the great department stores, whose volume gross of business transacted annually exceeds many times over that of the largest wholesale houses.

But this is not the question which arises in the construction of the Act of 1899, for the Legislature, discarding the ordinary use of language, declares in the second section the meaning of the first to be "that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act (to) be wholesalers, and all other venders of or dealers in goods, wares and merchandise shall be retailers and shall pay an annual license tax as provided in this act for retailers." The distinction thus set up between the "wholesaler" and the "retailer"

of the Act depends, not upon the size or the quantity of the individual sales, but solely upon the persons to whom the sales are made. A great yarn house, therefore, which makes a sale of tens of thousands of dollars of warps or filling to a great carpet manufacturer by that sale becomes a "retailer" and liable to pay twice as much on the whole volume gross of its business as its competitor, which confines itself to sales to dealers; a dealer in plumbers' supplies who sells to a plumber must pay twice as much as his competitor who does not; a paper house which sells to a paperhanger must pay twice as much as one which sells only to paper dealers.

Two mercantile houses each carry on a business of one million dollars a year in the same commodity. One makes a sale, large or small, to a manufacturer or a consumer; the other confines its sales to dealers. The latter will pay a mercantile license tax of five hundred dollars, while the former will have to pay one thousand dollars, simply and solely because it has made a sale to a manufacturer or a consumer, and this without regard to the size or amount of the sale.

Let us now re-read the clauses of the first section, in the light of the second section, and the ruling of the Supreme Court that the taxation is the taxation of the property of the dealer. They will read: "All dealers who shall sell to manufacturers or any other person or persons than dealers shall pay a tax of one

mill on each dollar of their property. Each dealer who shall sell to dealers and to no other person or persons, shall pay a tax of one-half mill on each dollar of his property." And bearing in mind that the Supreme Court has said, in Allentown *vs.* Gross (above), that this taxation is the same as in the case of money at interest, or real estate, the re-read clauses are the same as if they read: "All dealers who shall sell to manufacturers or any other person or persons than dealers, shall pay a tax of one mill on each dollar of their real estate. Each dealer who shall sell to dealers and to no other person or persons shall pay a tax of one half mill on each dollar of his real estate."

Surely, it cannot be seriously said that this does not conflict with Article IX, Sections 1 and 2 of the Constitution, which declare that "all taxes shall be uniform upon the same classes of subjects," and "all laws exempting property from taxation . . . shall be void." If it does conflict, the Act of 1899 must fall, no matter what inconvenience may result to the State. This portion of the Constitution is too important and valuable to be overridden by the Legislature or frittered away by judicial construction. It was intended to and does sweep away forever the power of the Legislature to impose unequal burdens upon the people under the form of taxation. The evils which led up to its incorporation into the organic law are well known. The burden of maintaining the State

has been in repeated instances lifted from the shoulders of favored classes and thrown upon the remainder of the community. This was done by means of favoritism and class legislation. Article IX of the Constitution was intended to cut up this system by the roots, and we shall have no more of it if the legislative and judicial departments of the Government perform their full duty in giving effect to that instrument. The taxing power of the State is great and searching. Within the limits of the Constitution it is bounded only by the necessities of the State. This must be so or the State might be without the means to sustain itself; to repel aggression from without or to suppress disorder within. So long as it lays the burden upon all alike there is hardly a limit to this power. It may take from the people what its necessities demand. The power of the State is conceded to select its subjects of taxation. It may tax mortgages or it may omit to tax them. It may tax horses or it may omit to tax them. But the tax, upon whatever laid, must be uniform. Thus it must be laid upon all taxpayers alike. It cannot tax A on his mortgages or his horses and exempt B from a like tax; or tax B half as much as A. Each must bear his equal share of the public burdens. This is because the Constitution provides that all taxes shall be uniform.

Fox's Appeal, 112 Pennsylvania State Reports, 337 (1886).

The question is not whether the Legislature can select particular classes of property for taxation, whether it can tax one article at one rate and another article at a different rate, but whether it can prescribe rules of taxation upon like property which shall vary as it is sold to one person or to another person.

It may be difficult, if not impracticable to obtain absolute equality between all classes of property. That is recognized; but there must be absolute equality between persons or owners of the same kind of property. The taxing power may select land and omit personal property, or select any particular kind of personal property and omit land, and the courts cannot interfere; but on whatever subject the tax is imposed, it must apply equally and uniformly to all owning similar property.

As Mr. Edmunds said in his argument in the income tax cases: "A tax on polls does not distinguish between tall and short men; or their wealth or health. Congress has passed a law that people coming by vessel shall pay a tax; but suppose Congress had said that in the port of New York the people coming by one line, the Cunard Line, should pay ten dollars; and that the people coming by the International Line (the Paris and New York) into the same port should pay fifteen dollars a head. What do you think would have been the decision in that case? Would my brother Carter say that was uniform? I take it not.

You would say Congress had no power to do anything of the kind. . . . It is true that the attainment of perfect equality in taxation is a baseless dream, as has been said. But it does not follow that the legislative power can lawfully and purposely go to the other extreme and impose taxes broadly designed to be unequal, and by false and arbitrary classification set one great body of citizens in conflict with another."

For if the Legislature can tax its so-called "retailer" twice as much as its so-called "wholesaler" it can tax him fifty times as much.

The unconstitutionality of the Act becomes even more obvious when we examine the third and last clause of the first section: "Each dealer in or vender of goods, wares or merchandise, at any exchange or board of trade, shall pay a mercantile license tax of twenty-five cents on each thousand dollars' worth gross of goods so sold."

Adding this clause the first section might be read as a whole: "All dealers who shall sell to manufacturers or any other person or persons than dealers shall pay a tax of one mill on each dollar of their property. Each dealer who shall sell to dealers and to no other person or persons shall pay a tax of one-half mill on each dollar of his property. Provided, that if the first mentioned dealer shall sell at an exchange or board of trade he shall be exempt from three-fourths of the tax on his property, while if the

second mentioned dealer do the same thing he shall be exempt from one-half of the tax on his property."

An unconstitutional act is not a law; it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

Poindexter *vs.* Greenhow, 114 United States Reports, 270.

Cooley's Constitutional Limitations, Chapter 7.

It would be no answer to say, even if it were true, that the whole volume gross of business transacted annually by a wholesaler is greater than that by a retailer. It is the dealer's property, be it small or great; be he rich or poor.

But it is notorious that the contrary is to-day the truth, and well known to every casual observer of the Senatorial contest in our State that a great motive for the preparation of the cunningly devised Act of 1899 was to injure and retard the progress and success of our great retail enterprises. Such an attempt was never before perpetrated in the history of the State. It cannot hide itself under this flimsy disguise of pretence of classification. The true rule is laid down by Justice Miller of the United States Supreme Court in his Lectures on the Constitution (New York, 1891): "The tax must be uniform on the particular article; and it is uniform within the constitutional requirement *if it is made to bear the same percentage.*"

II.

Is the Act Local or Special?

Section 3.

II.

The third section declares:

"For the purpose of carrying into effect the provisions of this Act, the appointment of mercantile appraisers shall be made annually on or before the thirtieth day of December of each year, by the county commissioners, except in cities of the first class, where the Auditor General and the treasurer of the city are authorized and required to appoint five suitable, qualified citizens, all of whom shall not be of the same political party, and the term of office of said appraisers shall be for three years."

It provides for the appointment of the mercantile appraisers *annually* by the *county commissioners*. It then in express words excepts from its operation cities of the first class where the *auditor general and the treasurer of the city* are authorized and required to appoint five suitable, qualified citizens *for three years*.

Article III, Section 7 of the Constitution declares: "The General Assembly shall not pass any local or special law . . . . regulating the affairs of counties, cities, townships, wards, boroughs or school districts . . . . creating offices or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts."

Notwithstanding the prohibition of the Constitution it has been determined by the Supreme Court *ex necessitate rei* that the Legislature may classify cities for certain purposes of legislation. But the purposes for which legislation according to such classification can be upheld have been defined as comprising only those relating to the organization or administration of their municipal governments. In other words, while the approved classification of cities authorizes all necessary legislation for them as cities in the management of their municipal affairs; on the other hand, they are under the Constitution and must remain part of the State of Pennsylvania for all purposes not municipal, and subject only to general laws on all subjects not of municipal concern.

Many efforts have been made to make the classification of cities for municipal purposes serve as a warrant for local legislation on subjects having no possible relation to municipal government, but the courts have uniformlly refused to sanction them.

Mercantile appraisers are not municipal officers.

They are not invested with any municipal powers.

They are not charged with the performance of any municipal function.

They are not under the control of the municipal legislature.

They are not under the control of the municipal executive.

They have nothing to do with municipal taxation.

They are not paid by the municipality.

They are the paid officers of the Commonwealth, engaged in the collection for the Commonwealth of a tax by the Commonwealth assessed, as the Commonwealth's servants.

In 1878 an attempt was made by the Legislature to classify counties for the purpose of regulating fees of officers. It was declared unconstitutional by the Supreme Court eight years afterward. Referring to the section of the Constitution under discussion, Chief Justice Paxson said: "It was a wise provision and will be sternly enforced. It is our purpose to adhere rigidly to that instrument that the people may not be deprived of its benefits. It ought not to be necessary for this Court to make this judicial declaration, but it is proper to do so in view of the amount of legislation which is periodically placed upon the statute books in entire disregard of the fundamental law. Much of this legislation may remain unchallenged for years, only to be overturned when it reaches this Court. In the meantime parties may have acted upon it, rights may have grown up, and the inconvenience and loss entailed thereby may not be inconsiderable. As we view it, this note of warning at this time is needed. . . . If it can exclude Philadelphia and Pittsburgh, it can exclude every other county in the State, but the one county seeking such special or local legislation. . . .

It is special legislation under the attempted disguise of a general law. Of all forms of special legislation this is the most vicious."

Morrison *vs.* Bachert, 112 Pennsylvania State Reports, 322 (1886).

In 1888 an Act relating to street railways in cities of the third class was held to be local, and therefore unconstitutional, not relating to municipal affairs of cities of the third class, but to certain corporations that happened to be located within them.

Weinman *vs.* Railway Co., 118 Pennsylvania State Reports, 192 (1888).

The cities in this State are divided into classes by the Act of May 23, 1874, Pamphlet Laws 230. The object of the classification is stated in the body of the act in these words: "For the exercise of certain corporate powers, and having respect to the number, character, powers and duties of certain officers thereof." The first class embraced cities having a population of 300,000 and upwards; the second, those whose population exceeded 100,000 and did not exceed 300,000; the third, those whose population was less than 100,000.

The object of classification being thus clearly stated in the body of the act which ordains it, we are not left to conjecture. The Legislature has declared its object in providing a system of classification to be to facilitate the convenient exercise of certain corporate powers

necessary for the proper regulation of municipal affairs. It does not authorize legislation on subjects not relating to municipal affairs. As was said by the late Justice Williams, in *In re* Ruan Street, 132 Pennsylvania State Reports, 257 (1890), declaring the Act of May 6, 1887, Pamphlet Laws, page 87, which provided a procedure in road cases for cities of the first class, unlike that in use in the rest of the State, unconstitutional: "These are the only purposes contemplated by the Legislature. They are the only purposes for which classification seems desirable, they are the only purposes for which it has been upheld. . . . All legislation not relating to the exercise of corporate powers or to corporate officers and their powers, as cities, is unauthorized by classification."

The collection of mercantile taxes is certainly not one of the corporate powers of cities of the first class, and mercantile appraisers are certainly not corporate officers thereof.

To the same effect are the cases of Van Loon *vs.* Eagle, 171 Pennsylvania State Reports 157, decided in 1895, and Chalfant *vs.* Edwards, 173 Pennsylvania State Reports, 246, decided in 1896, in both of which the same learned Justice Williams affirmed and vindicated the reasoning of the earlier cases.

The only conceivable reason for the exception of Philadelphia would be its greater population. But is there any necessity for classification springing from this peculiarity? Why does difference in population

make it necessary to have a different law for Philadelphia? Why may not a general law be framed adapted to the needs of all? It is difficult to discover an answer to this question. If the law for the rest of the State is inadequate for a city like Philadelphia, how is it adequate for Pittsburgh, with its 295,000 inhabitants? And even if it is inadequate it does not follow that a general law could not be framed which would meet the needs of Philadelphia and Pittsburgh and still not be inadapted to the wants of the smaller cities. It is certainly not impracticable to form a general law, and the very purpose of Article III, Section 7, of the Constitution was, not to limit legislation, but merely to prohibit the doing by local or special laws that which can be accomplished by general laws. It relates not to the substance, but to the method of legislation and imperatively demands the enactment of general instead of local or special laws whenever the former are at all practicable.

Ayars' Appeal, 122 Pennsylvania State Reports, 266 (1889).

We are not called upon, however, to show the necessity or vindicate the wisdom of the constitutional requirement. It is enough for us to know that it is an express mandate of the organic law which the Legislature ought to obey and courts are bound to enforce.

But even conceding for a moment for the sake of argument that the Act of 1899 does not conflict with

Article III, Section 7, it can scarcely be denied that the mercantile license tax is a tax and levied by the authority of the State, as the Act itself as well as the Supreme Court has declared. Now Article IX, Section 1, of the Constitution declares that all taxes shall be levied and collected under general laws:

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

"Thus," said Chief Justice Sterrett, in Ayars' Appeal, 122 Pennsylvania State Reports, 266 (1889), speaking of this clause, "by express mandate . . . all taxes must be levied and collected under general and not special or local laws." And again he said: "It is expressly required, as we have seen, that 'all taxes shall be levied and collected under general laws'; and it is impossible to suggest any valid reason why they should not be thus levied and collected. When the present Constitution was adopted local and special laws relating to . . . assessment and collection of taxes were in force in some of the cities and remained unaffected by that instrument; but that fact will not justify the substitution of other local or special laws in their stead. When new legislation is resorted to, it must conform to the requirements of the Constitution."

The only fair conclusion from these premises seems to be that the Act of 1899 is unconstitutional and void.

III.

Is the Act not a Forbidden Violation of Private Rights and a Forbidden Delegation of Legislative Functions.

Sections 4 and 5.

III.

The Constitution of the United States declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

The Constitution of Pennsylvania declares that all men have certain inherent and indefeasible rights, among which are those of acquiring, possessing and protecting property; and that the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures.

While the fifth section of the Act of 1899 declares that in Pennsylvania each dealer shall fill up and swear to certain undescribed blanks to be prepared after the Act goes into effect by the auditor general for such information as to the dealers' private business as the auditor general may then prescribe; and that upon the dealer's refusal to do so the county treasurer shall "require the owner or business manager to appear before him with the books and accounts of the mercantile establishment for interrogation and examination . . . and compel the attendance of the owner or any clerk, bookkeeper or officer connected with said business to produce such books and papers as he may deem expedient . . . " and further

declares that if the owner, proprietor or any other person connected with the business refuses he shall be liable to a penalty of one thousand dollars.

If the constitutions of our Country and our State have really created any barrier to protect citizens against tyrannical invasions of private rights, the Legislature possessed no such power. The protection of our constitutions does extend to a citizen's books and papers wherever they may be. It is justly assumed that every man may have secrets pertaining to his business or his family or his social relations, to which his books, papers, letters or journals may bear testimony, but with which the public, or any individual of the public, who may have controversies with him, can have no legitimate concern ; and even if they happen to be disgraceful to him, they are nevertheless his secrets, and are not to be exposed. Even a search warrant to seize private papers is wholly unwarranted, except, possibly, in cases of frauds upon the revenue, where the papers to be searched for have been the agencies or instruments by means of which the frauds have been accomplished.

Cooley's Principles of Constitutional Law, page 220.

The Legislature, itself, possessed no such power, we have seen ; and we shall see from a reading of the fourth section that it nevertheless attempted to delegate the legislative function of prescribing what was to be required of the dealer to escape the threatened

illegal invasion of his private rights to the auditor general:

"Section 4. The Auditor General shall be authorized and required to prepare and have printed proper blanks, to be distributed by the mercantile appraisers in the several counties to each vender of or dealer in goods, wares or merchandise. These blanks shall be in the form prescribed by the Auditor General, and shall contain a request for such information as may be necessary in arriving at the actual amount of business transacted by the vender of or dealer in goods, wares and merchandise, during the calendar year preceding that for which a license is required. The blanks thus prepared shall contain an affidavit; and every dealer subject to the provisions of this Act shall be required to make an affidavit, by oath or affirmation, as to the correctness of the return made."

Under a well-balanced constitution the Legislature can no more delegate its proper function than can the judiciary.

The fourth section is a delegation of legislative power, because:

1. It does not fix the terms and conditions of the blank.

2. It delegates to a single individual the power to prescribe the form of the blank, and the conditions and restrictions to be added to, and made part of it, and to decide what questions may be necessary.

3. The appointee clothed with the power is not named, but is designated only by his official title. He is the person who may happen to be auditor general when the time comes to prepare the form of the blank.

4. The legislative appointee is not required to report his work to the body appointing him, but simply to distribute the forms of blanks he has devised. The form does not become part of the statute, in fact, is not recorded in the statute-book, and no trace of it can be found among the records of either branch of the Legislature.

5. The Act was approved May 2, 1899. The legislative appointee had until the first of the next January to prepare the form, over which when prepared, the Legislature had no control whatever. The legislators did not consider, they had no knowledge of the questions they required each dealer to answer under oath, within ten days, under penalty of the seizure of his private books and papers by the county treasurer, and a penalty of one thousand dollars. The Legislature says, in effect, to its appointee, "Prepare just such orders as you please. We do not care to know what they are. The Governor shall have no opportunity to veto them. Distribute them, and we will compel every dealer to obey and answer under oath by the punishment of every man who hesitates."

It is not to be supposed that a blank, so mischievous

as the one prepared after the adjournment of the Legislature by the auditor general, a copy of which is given below, could have passed both houses of the Legislature. If, by reason of any complication of circumstances, this should have happened, still the people would have had a remaining safeguard in the veto power possessed by the Governor. The Act of 1899 steered past both legislative discussion and executive veto, and vested in the legislative appointee the power to prepare and distribute the blank, without even the knowledge of the Legislature or the Governor of its provisions, which were to be bound under penalties of invasions of private books and papers, and of heavy fines upon thousands of citizens all over this Commonwealth.

It will not do to say that the preparation of this form was an unimportant matter of detail, or an act partaking of an executive or administrative character. It was the sole purpose of the fourth and fifth sections. Its enforcement was the object of the penalties of the fifth section. Take out the form prepared by the auditor general and to be found in some pigeon-hole in his office, and the fourth and fifth sections are without meaning or effect. They are completely eviscerated. O'Neill *vs.* Insurance Co., 166 Pennsylvania State Reports, 72 (1895).

The following form prescribed by the auditor general is inserted for the purpose of showing the impolicy

of such delegation of legislative power as might make it possible to fasten upon the people of this Commonwealth such an inquisitorial, misleading, unjust and oppressive burden.

If not delivered to the Mercantile Appraiser when called for, this must be brought to the

No. .....
Ward..... .....

Retail Vender
Mercantile Form No. 1,
Anno Domini 1900.

COMMONWEALTH OF PENNSYLVANIA.
COUNTY OF PHILADELPHIA.

RETURN FOR MERCANTILE LICENSE TAX:
RETAIL VENDER A. D. 1900.

The undersigned.....

hereby declares that as { Individual dealer; / Member of the firm; / Representative of corporation. } *transacting business at* .....

Street, Philadelphia, under the name of.....*has authority and information to declare, and being duly* { *sworn* / *affirmed* } *according to law, does declare that as Retail Vender or Dealer in Goods, Wares, Merchandise, Commodities or Effects of whatsoever kind or nature (except liquors) the whole volume, gross, of all Retail Business transacted for the calendar year of twelve months ending December 31st, 1899, including all sales for which payment has been made, and all sales for which payment has not been made, was as follows, and not in excess thereof, viz:*

Total Cash Receipts for sales during 12 months ending December 31st, 1899 . . . . . $.....
Total value or amount charged for sales for same year for which payment has not been made, $.....
Making total sales for 12 months ending December 31st, 1899 . . . . . $.....

and further declares that this return includes all Retail Sales made in any part of said City and County of Philadelphia by said party or parties during any portion of the calendar year above described.

Sworn to or affirmed before me the
.....*day of*.....
1900.
.....
Mercantile Appraiser.

(*Sign name here*) .....
of the firm or corporation known as.....
.....
Address.....*Street.*

office of the Board of Mercantile Appraisers, Room 143, City Hall, to be signed and sworn to within ten days.

$1,000 penalty for refusal to make sworn return or produce books, papers, etc., before the County Treasurer.

All dealers or venders must make return; no exemption on account of amount sold.

COMMONWEALTH OF PENNSYLVANIA,

COUNTY OF PHILADELPHIA.

SUMMONS: *Whereas:* The Act of Assembly approved and signed by the Governor of the Commonwealth of the second day of May, 1899, requires and compels each and every person selling Merchandise, Goods, Wares, Commodities or Effects of any kind whatsoever, whether at Retail or Wholesale; and including everything sold, no matter how small the quantity—except in such cases as are designated by law—to make a Return under Oath or Affirmation each year, of the amounts so sold in the previous calendar year. And the said law imposes a penalty of one thousand dollars for refusing to make said return;

THEREFORE TAKE NOTICE: This Return must be made out by you, and if not delivered to a Mercantile Appraiser calling for the same within ten days from the date this notice is mailed to you, you must deliver this in person and make Oath or Affirmation thereto at the office of the Board of Mercantile Appraisers, Room 143, City Hall, Philadelphia, Pennsylvania.

FOR THE COMMONWEALTH.

SEAL

.....

.....

.....

.....

.....

Board of Mercantile Appraisers.

Does anybody suppose for an instant that such a paper would have received the approval of a single member of the House or Senate or of the Governor, if any of them had ever seen or heard of it?

Men, wrongfully claiming to be mercantile appraisers, without any real act of Assembly behind them, by sheer arbitrary force and a pretended writ of summons, under an imitation, bogus seal, are attempting to terrorize merchants and to invade their offices and private books and papers.

IV.

Emoluments of Officers under the Act.

Section 10.

IV.

The tenth section provides that the rate of commissions allowed county treasurers, the fees of county treasurers and mercantile appraisers, and the provisions as to advertising shall be the same as heretofore.

As the new law enormously increases the total amount of the mercantile tax the increased commissions of the county treasurer will produce a princely income. As it permits no exemptions of venders, no matter how little they sell, and allows the appraiser a liberal fee for every vender returned, whatever may be the final disposition of the case and whether anything be collected or not, it presents golden opportunities for additional fees and for additional advertising.

Yet there is probably no constitutional remedy for this expert fee-grabbing device.

And the benevolence of the lawmaker has not forgotten the ward constable. After the auditor general, the treasurer, the appraiser and the favorite organ are through with the taxpayer, the ward constable will take him up. After the auditor general, the treasurer and appraiser have completed their work the ward constable will examine and correct it. The ward constable will report omissions at fifty cents per head.

"And after such publication or advertisement shall have been properly made, it shall be the duty of the constable of his respective ward, district or township to compare the list, and report to the county or city treasurer all omissions found, and for such service the constable shall receive a fee of fifty cents for each and every omission so reported."

As this affects every taxpayer in the Commonwealth, it is a satisfaction to say that it can not be enforced, however much we may commiserate the ward constable, and we can readily understand that with a charge of fifty cents for each "report" the clause might be made the source of vast income to him. The title of the Act reads: "An act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares and merchandise, and providing for the collection of said tax." This is all very well so far as it goes, but what is there in the title to give notice that the cost of this perfection of the work of the auditor general, treasurer and appraiser by the ward constable is thrown upon the taxpayers of Philadelphia and the other counties of the State. In Phœnixville Borough Road, 109 Pennsylvania State Reports, 44, it was held that the Act of March 18, 1868, Pamphlet Laws 352, entitled: "An Act relating to boroughs in the County of Chester," which repealed certain provisions of a general act, the effect of which was to relieve the property owners in the borough from the burden of

paying damages for roads opened within the borough and to shift that burden upon the county, was unconstitutional for the reason that there was nothing in the title of the act to give notice to the property owners of the county that the burden had been placed upon them. In Pierie *vs.* The City of Philadelphia, 139 Pennsylvania State Reports, 573 (1891), it was held that the provision of the Act of June 24, 1885, Pamphlet Laws 160, directing the payment of fees to recorders out of the county treasury is unconstitutional, the title, "An act to perfect the record of deeds, mortgages and other instruments in certain cases," giving no notice that the act contained such a provision. The Act of 1899 comes precisely within these rulings. There is nothing in the title of the act to give notice or warning to the taxpayers of the State that the ward constable's fees for "comparing" and "reporting" were imposed upon them. The last clause of the tenth section is plainly unconstitutional.

V.

Does the Act Contain More than One Subject Not Clearly Expressed in the Title?

Section 11.

V.

The eleventh section, *in extenso*, is as follows: "Section 11. Each dealer who comes under the provisions of this act shall cause to be placed permanently, at the entrance of his or their place of business, a sign describing the business in which the party is engaged, with his or their name or names upon the same such sign; and a violation of the provisions of this section shall be punishable with a fine of ten dollars, said fine to be collected as fines of like amount are now by the law collected, and to be paid into the county treasury."

Often, and sometimes intentionally, the real purpose of an act has been disguised by a misleading title. A reading of this section might suggest to the suspicious mind the thought that the real purpose of the act was to provide for a boom in sign painting, or to provide revenue for sign painters; and that, in the heat of battle, the Legislature was misled and kept in ignorance as to the true character of the legislation by the evil device of calling the act "An Act to provide revenue by imposing a mercantile license tax . . . ."

From such a wicked deception the legislator may find a sure refuge beneath the rock of the Constitution, which provides that the subject of a bill must be clearly expressed in the title.

As the historian turns from the stormy scene of Senatorial carnage of 1899 to the restful perusal of this eleventh section, he may be fancied to exclaim with Gibbon: "The vain titles of the victories of Justinian are crumbled into dust, but the name of the legislator is inscribed on a fair and everlasting monument."

PART II.

SOME FEATURES OF THE MERCANTILE TAX LAW OF THE STATE WITHOUT REGARD TO THE QUESTION OF UNCONSTITUTIONALITY.

VI.

Who is a Vender or Dealer.

VI.

The words of the Act are: "Each vender and dealer in goods, wares, and merchandise."

The words of the acts under which the mercantile license tax has heretofore been collected are of the same meaning.

The words of the Act of May 4, 1841, Pamphlet Laws, page 307, paragraph 10, are: "All persons engaged in the selling or vending of goods, wares, merchandise, commodities, or effects," "sellers and venders."

The words of the Acts of April 16, 1845, Pamphlet Laws, page 532, April 22, 1846, Pamphlet Laws, page 486, April 18, 1855, Pamphlet Laws, page 244, and April 8, 1873, Pamphlet Laws, page 566, are "dealers."

The words of the Act of April 13, 1866, Pamphlet Laws, page 104, are "venders," "dealers."

The meaning of these words, vender and dealer, has been judicially declared.

Norris Brothers *vs.* The Commonwealth, 27 Pennsylvania State Reports, 494, was decided in 1856. This was an action brought at the suit of the Commonwealth to recover the amount of a mercantile tax, imposed upon the makers of locomotives. It was held that they were not liable. "A dealer," says Justice Black, "in the popular, and therefore in the statutory,

sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows upon his commodities, but upon the skill and foresight with which he watches the market. . . . The meaning of the statute is perfectly clear. The Legislature understood the words it was using. A tax was laid upon dealers, that is upon those who should buy to sell. This, of course, did not include persons who sold the wares manufactured by themselves."

The Commonwealth *vs.* Campbell, 33 Pennsylvania State Reports, 380, followed in 1859. It held that a tanner who purchases hides, makes them into leather and sells them is not a dealer. Chief Justice Lowrie said: "In endeavoring to ascertain the classes who are taxable by the mercantile appraisers, we find them described in the Act of 1830 by the terms 'every person who shall deal in selling goods and merchandise.' . . . The Act of 1841 gives much the same description of the class, using the terms 'all persons engaged in selling,' etc. . . . It also calls them 'dealers,' and describes them as persons who make 'purchases and sales.' . . . The Act of 1845 . . also calls them 'dealers.' Now, it seems to us quite clear that all these modes of expression are merely different forms of describing the class called merchants and shop keepers . . . Dealers are middlemen between the manufacturer or producer and the consumer."

VII.

Who is Not a Vender or Dealer.

VII.

The Act of April 22, 1846, Pamphlet Laws, page 486, provides that mechanics who keep a store or warehouse at their own shop or manufactory for the purpose of vending their own manufactures exclusively shall not be required to take out any license.

The Act of February 27, 1868, Pamphlet Laws, page 43, declares the true intent and meaning of the former act to be that a manufacturer or mechanic not having a store or warehouse apart from his manufactory or workshop for the purpose of vending goods shall not be required to pay the annual tax and license, and that an affidavit setting forth the fact shall be sufficient evidence for the appraiser not to classify him.

And the Act of April 9, 1870, Pamphlet Laws, page 59, provides that manufacturers and mechanics who shall sell goods, wares and merchandise other than their own manufacture not exceeding five hundred dollars per annum shall not be required to pay any annual tax or license fee; but if such sales shall exceed five hundred dollars per annum they shall be classified in the same manner and required to pay the same annual tax as is now required to be paid by dealers in foreign merchandise.

These acts are not repealed by the Act of 1899.

The meaning of these words, manufacturer and mechanic, has also been the subject of judicial construction.

In Norris Brothers *vs.* The Commonwealth (above), 27 Pennsylvania State Reports, 494, Mr. Justice Black said: "A man who makes locomotives is a mechanic. If he is not I know not why we should give that appellation to one who makes wagons or wheelbarrows." The tire of the engine wheels was bought and not made at the Norris Brothers' shop, and it was insisted on this account that the machines were not their own manufacture. "But," said Justice Black, "what is manufacturing? It is making. To make in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities or new combinations to matter which has already gone through some other artificial process. A cunning worker in metals is the maker of the wares he fashions, though he did not dig the ore from the earth or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not tan the leather. A bureau is made by the cabinetmaker though it consists in part of locks, knobs and screws bought ready made from a dealer in hardware."

Under the authority of this leading case it has since been held

That a tanner who purchases hides, makes them into leather and sells them is not liable to pay a mercantile license tax.

Commonwealth *vs.* Campbell (above), 33 Pennsylvania State Reports, 380 (1859).

Nor a miller who purchases grain and sells flour and feed made therefrom.

Lamen *vs.* Paxton, 2 Luzerne. Legal Register 259 (1874).

Nor a farmer who sells produce in a market.

Barton *vs.* Morris, 1 Weekly Notes of Cases, 543, (1875).

Nor a butcher who sells meat, slaughtered by himself, in a market-house stall or from a wagon.

Givier's Appeal, 12 Weekly Notes of Cases, 236, (1882).

Nor one engaged in the business of butchering and selling lambs, calves and sheep, and dressing and selling poultry.

Commonwealth *vs.* Brinton, 3 District Reports, 783, (1894).

Nor a plumber.

In regard to a plumber, the Supreme Court said in 1896:

"He is neither a manufacturer nor a dealer in the strict sense of the latter term. He does not buy to sell the articles he uses. He does not sell them in the literal sense, and he only buys them when he has a

job of work to do for which he requires them. As between the dealer and himself he is the consumer. He needs the articles in his business. He puts them into buildings, putting his own work upon them, but when they are placed there they are not in the same shape as when he received them, but as a compact whole composed of all the materials required for the purpose, no matter from what source he obtained them. For instance, a complete steam-heating apparatus requires boilers, radiators, pipes, valves, one or more furnaces, and other articles to make a complete work. Some of these things might be obtained from one dealer, and others from other dealers, but the ultimate thing which the plumber supplies to his customer is not the thing that he bought. His own work, too, must be added, a necessary and expensive part of the completed whole, as all persons know who have such bills to pay. How then can it be said that such a person is a dealer, when the thing which he sells is not the thing which he buys? Even the manufacturer who does sell the very article he makes is not liable to the tax unless he keeps a store at which his products are sold; how, then, can a mere mechanic, who buys ingredients from others and works upon them, combining them into one completed whole, be regarded as a dealer? We think he cannot."

The Commonwealth of Pennsylvania *vs.* John Gormly, 173 Pennsylvania State Reports, 586.

Nor a merchant tailor.

The Commonwealth of Pennsylvania *vs.* John McAllister, Common Pleas Court No. 2, of Philadelphia County, of June Term, 1895, No. 30.

Nor a Paperhanger.

The Commonwealth of Pennsylvania *vs.* Richard Ogden, Court of Common Pleas No. 4, of Philadelphia County, of June Term, 1896, No. 98.

Nor an Undertaker.

The Commonwealth of Pennsylvania *vs.* William A. Robson, Court of Common Pleas No. 4, of Philadelphia County, of March Term, 1896, No. 1246.

Nor a Confectioner.

The Commonwealth of Pennsylvania *vs.* Robert Young, Common Pleas Court No. 1, of Philadelphia County, of March Term, 1898, No. 1092.

And in regard to farmers the Legislature somewhat unnecessarily provided in the fifth section of the Act of April 18, 1878, Pamphlet Laws, page 26, §5, that "farmers selling their own produce or occupying a stall or stalls or sidewalk or part thereof in any of the markets of a city of the first class shall not be subject to classification or taxation for mercantile purposes."

On principle and authority, therefore, it may safely be affirmed that, while all of the following classes and many others have been wrongfully and contrary to the law of this Commonwealth saddled with the burden of the mercantile license tax in the past, they are, none of them, venders or dealers within the meaning

of the Act of 1899, nor subject in any way to any of its provisions.

Apothecaries,
Bakers,
Bookbinders,
Butchers,
Canners,
Caterers,
Chemists,
Clothing Makers,
Confectioners,
Coffee Roasters,
Dressmakers,
Farmers,
Florists,
Furriers,
Hatters,
Ice Cream Makers,
Jewelers,
Locomotive Makers,
Merchant Tailors,
Millers,
Milliners,
Opticians,
Paperhangers,
Photographers,
Plumbers,
Publishers,

Shirtmakers,
Shoemakers,
Stationers,
Tanners,
Undertakers,
Upholsterers,
Watchmakers.

VIII.

THE LAW AS TO MANUFACTURERS OR MECHANICS.

VIII.

In the last chapter it was shown that manufacturers and mechanics, including

Apothecaries,
Bakers,
Bookbinders,
Butchers,
Canners,
Caterers,
Chemists,
Clothing Makers,
Confectioners,
Coffee Roasters,
Dressmakers,
Farmers,
Florists,
Furriers,
Hatters,
Ice Cream Makers,
Jewelers,
Locomotive Makers,
Merchant Tailors,
Millers,
Milliners,
Opticians,

UNIVERSITY

Paperhangers,
Photographers,
Plumbers,
Publishers,
Shirtmakers,
Shoemakers,
Stationers,
Tanners,
Undertakers,
Upholsterers,
Watchmakers,

and all persons similarly employed are not subject in any way to any of the provisions of the new mercantile tax law of 1899.

What is their legal liability to payment of a mercantile license tax?

The answer is to be found in the Act of February 27, 1868, Pamphlet Laws, page 43, § 1:

"A manufacturer or mechanic not having a store or warehouse apart from his manufactory or work-shop, for the purpose of vending goods, shall not be required to pay the annual tax and license."

And in the Act of April 9, 1870, Pamphlet Laws, page 59, § 1:

"Manufacturers and mechanics who shall sell goods, wares or merchandise other than their own manufacture, not exceeding five hundred dollars per annum, shall not be required to pay any annual tax or license

fee; but, if such sales shall exceed five hundred dollars per annum, they shall be classified in the same manner and required to pay the same annual tax as is now required to be paid by dealers in foreign merchandise."

All these classes, therefore, pay no tax whatever upon their sales of their productions, except in the one rare instance where they keep separate stores at different places from their ordinary places of business.

And they pay no tax whatever even upon their sales of articles other than their own productions, except in the one very rare instance where such sales of articles other than their own productions exceed five hundred dollars per annum.

And, even in these two rare instances, they do not become in any way subject to any of the provisions of the new law of 1899.

Then, as the Act of April 9, 1870, declares, "they shall be classified in the same manner and required to pay the same annual tax as is now required to be paid by dealers in foreign merchandise."

The inquiry, therefore, is: How were dealers in foreign merchandise classified and what annual tax were they required to pay on April 9, 1870?

The answer to this inquiry is the Act of May 4, 1841, Pamphlet Laws, 307, §10. "All such sellers or venders shall be classed and required to pay annually for the use of the Commonwealth for their respective licenses as follows, viz:

"Those who are esteemed and taken to make and effect annual sales to the amount of three hundred thousand dollars and upwards, shall constitute the first class, and pay two hundred dollars ;

"Those to the amount of two hundred thousand and less than three hundred thousand, the second class, and pay one hundred and fifty dollars ;

"Those to the amount of one hundred thousand, and less than two hundred thousand, the third class, and pay one hundred dollars ;

"Those to the amount of eighty-five thousand, and less than one hundred thousand dollars, the fourth class, and pay eighty dollars ;

"Those to the amount of seventy-five thousand, and less than eighty-five thousand dollars, the fifth class, and pay sixty dollars ;

"Those to the amount of sixty thousand, and less than seventy-five thousand dollars, the sixth class, and pay fifty dollars ;

"Those to the amount of fifty thousand, and less than sixty thousand dollars, the seventh class, and pay forty dollars ;

"Those to the amount of forty thousand, and less than fifty thousand dollars, the eighth class, and pay thirty dollars ;

"Those to the amount of thirty thousand, and less than forty thousand dollars, the ninth class, and pay twenty-five dollars.

"Those to the amount of twenty thousand, and less than thirty thousand dollars, the tenth class, and pay twenty dollars;

"Those to the amount of fifteen thousand, and less than twenty thousand dollars, the eleventh class, and pay fifteen dollars;

"Those to the amount of ten thousand, and less than fifteen thousand dollars, the twelfth class, and pay twelve dollars and fifty cents;

"Those to the amount of five thousand, and less than ten thousand dollars, the thirteenth class, and pay ten dollars;

"Those to an amount less than five thousand, the fourteenth class, and pay seven dollars; . . .

"*Provided*, That no person whose annual sales do not exceed one thousand dollars; and no *feme sole* trader or single woman whose annual sales do not exceed two thousand five hundred dollars . . . shall be required to take out a license."

And the Act of April 13, 1866, Pamphlet Laws, page 104, §1:

"In addition to the present classification of licenses of venders of merchandise, all dealers who are esteemed and taken to effect annual sales to the amount of five hundred thousand dollars shall constitute Class A, and pay three hundred and fifty dollars; those to the amount of one million of dollars, Class B, and pay four hundred and fifty dollars; those to

the amount of two millions of dollars, Class C, and pay six hundred dollars; those to the amount of three millions of dollars, Class D, and pay eight hundred dollars; those to the amount of four millions of dollars, Class E, and pay nine hundred dollars; those to the amount of five millions of dollars, Class F, and pay one thousand dollars."

Adding the city fee for issuing license, fifty cents in each case, the tariff of licenses, therefore, for the few members of these classes who keep separate stores and make sales of articles other than their own productions exceeding five hundred dollars per annum, is:

CLASS.	ANNUAL SALES.	LICENSE.
14	$ 1,000 to $ 5,000	$ 7 50
13	5,000 to 10,000	10 50
12	10,000 to 15,000	13 00
11	15,000 to 20,000	15 50
10	20,000 to 30,000	20 50
9	30,000 to 40,000	25 50
8	40,000 to 50,000	30 50
7	50,000 to 60,000	40 50
6	60,000 to 75,000	50 50
5	75,000 to 85,000	60 50
4	85,000 to 100,000	80 50
3	100,000 to 200,000	100 50
2	200,000 to 300,000	150 50
1	300,000 to 500,000	200 50
A	500,000 to 1,000,000	350 50
B	1,000,000 to 2,000,000	450 50
C	2,000,000 to 3,000,000	600 50
D	3,000,000 to 4,000,000	800 50
E	4,000,000 to 5,000,000	900 50
F	5,000,000 and upward	1,000 50

exempting, however, all of them whose annual sales do not exceed one thousand dollars, and all married or single women of them whose annual sales do not exceed two thousand five hundred dollars.

And all these classes, being in no wise subject to any of the provisions of the new law, can, under no circumstances be required to answer any of the questions prescribed by the Auditor General and which are discussed in Chapter III above. And, if there were, at this time, any legally constituted mercantile appraisers, the only way the officers could proceed against any of them would be under the Act of April 11, 1862, Pamphlet Laws, page 492, §1, which provides as follows :

"It shall be the duty of the mercantile appraisers in the several cities and counties of this State, personally to visit the store, distillery, brewery, or other place of business of every person whom they are required by law to ascertain and assess, and at the time of such visit, to give to each such person living on the premises, a written or printed notice, specifying the classification and amount of license money to be paid by such person to the State and also the time and place when and where he, the said appraiser, will hold an appeal, as required by law."

And the written or printed notice required to be given by the Act is simply

"You are hereby notified that you have been clas-

sified in the ..... class and the amount of your license is $..... The time and place of holding an appeal in your case is .... the ..... day of .....A. D., 190 , at .....(place)."

Anything more than this is unauthorized and contrary to law.

PART III.

REMEDIES.

IX.

The Seven Remedies of the Citizen.

IX.

First.—Bill in Equity.

A court of equity will not interfere to restrain the collection of taxes, but will leave the party aggrieved to his remedy at law, where the tax is lawfully assessed or where the matters complained of are mere irregularities in the valuation or assessment.

But where there is either a want of power to tax, or a disregard of the Constitution in the mode of assessment, there is no doubt of the power and the duty of a court of equity to interfere.

Thus Bangor's Appeal, 109 Pennsylvania State Reports, 79 (1885), was a bill in equity wherein George S. Bangor was complainant and the City of Williamsport and Martin O'Hara, tax collector, were defendants. The bill set forth that the complainant was a citizen and taxpayer of the City of Williamsport, that the city had assessed his occupation at two thousand dollars and that, in doing so, the said city had clearly violated the provisions of the Constitution of Pennsylvania, wherein it provides that all taxes shall be uniform upon the same class of subjects. The bill prayed that the said city of Williamsport, her officers, agents and employees, and the said O'Hara, might be restrained by injunction from the collection of said

tax; and the Supreme Court, upon appeal, ordered that the record be remitted to the court below with instructions to issue an injunction as prayed for in the bill.

And so, in a similar bill, can be raised all the questions as to the constitutionality of the Act of 1899, except the question of the right of the men claiming to be mercantile appraisers to exercise the duties of the office.

Second.—Quo Warranto.

While an injunction will not be granted to restrain an individual from exercising the office of mercantile appraiser, the question of his right to exercise the duties of the office may be tried by proceedings in a writ of quo warranto, which affords an ample legal remedy. "There is," says the learned Court, in the case of Hagner *vs.* Heyberger, 7 Watts & Sergeant, 104 (1844), "an adequate and exclusive remedy at law in such a case by a writ of quo warranto."

Third.—Refusal To Pay.

Upon petition of citizens, the fiscal agents of the State might decline to approve or pay the demands of those claiming to be mercantile appraisers for services claimed to have been rendered as such.

Fourth.—Affidavit under The Act of February 27, 1868, Pamphlet Laws, page 43, § 1.

The Act provides:

"The true intent and meaning of the eleventh section of an act entitled, 'An act to provide for the reduction of the public debt,' approved April 22, 1846, is hereby declared to be, that a manufacturer or mechanic, not having a store or warehouse apart from his manufactory or workshop, for the purpose of vending goods, such manufacturer or mechanic shall not be classified or required to pay the annual tax and license, as is now required in relation to foreign dealers, and that an affidavit before an alderman or justice of the peace, or any person authorized by law to administer an oath or affirmation, setting forth the fact that such manufacturer or mechanic has not a store or warehouse apart from his manufactory or workshop, shall be sufficient evidence for the appraiser of mercantile tax not to so classify said manufacturer or mechanic; *Provided*, That any person swearing falsely in relation to any matter provided for in this act shall be deemed guilty of perjury, as if said oath had been taken in any legal proceeding."

The affidavit under the Act should be in this form:

COUNTY, *ss.*

.....

being duly sworn (or affirmed) according to law, doth depose and say that he is a manufacturer or mechanic

and that he has not a store or warehouse apart from his manufactory or workshop.

Sworn (or affirmed) and subscribed to before me this ..... day of A.D. 190.....

Notary Public.

A mercantile appraiser should not classify as a vender or dealer any manufacturer or mechanic or any member of any of the classes given in Chapters VII and VIII or any person similarly employed who swears or affirms to such an affidavit and presents it to the appraiser, except in the very rare instance where the affiant sells goods other than his own productions exceeding the sum of one thousand dollars per annum.

Fifth.—Appeal.

The Act of April 16, 1845, Sections 5, 6, 7, 8 and 9, Pamphlet Laws, pages 533, 534, inaugurated the system in force up to this year (1900), for the ascertainment and assessment of all dealers. Its provisions were local, applying only to the counties of Philadelphia and Allegheny; but by the Act of April 22, 1846, Pamphlet Laws, page 486, they were extended throughout the State. Under this law the assessments are required to be made before the first day of May, by an officer styled the "appraiser of mercantile taxes," whose duties are therein clearly

defined. He is to prepare a list of all dealers in the county, arranging them in their several classes, and to give notice by advertisement of the assessment and classification made by him. If any person or firm complains to the appraiser that the assessment against him or them has not been properly made, the appraiser may hear the person on oath, and may increase or reduce the assessment. If the person assessed is dissatisfied with the decision of the appraiser, he may appeal to the judges of the court of common pleas, whose decision upon the question is made final. The decision of the court upon an appeal from the decision of the appraiser, was made final, however, by the Act of 1845, only so far as regards the amount, and the amount was regulated by the class in which the dealer was placed. This amount was, by the Act of March 4, 1825, Pamphlet Laws, page 30, to be collected by suit, before an alderman or justice of the peace, from whose decision there was allowed an appeal to the court of common pleas, which appeal took grade with other suits brought in court. Thus far the Legislature had left open the question of liability to the tax in all cases where suit was brought to recover it. One who denied his being a dealer within the meaning of the law had no occasion to appeal to the appraiser or to the court; he could make his defence before the magistrate, or on appeal from the magistrate's judgment.

This was the cause of great delay and uncertainty in the collection of the taxes. In some instances, years might be consumed in litigation in the common pleas and supreme court in determining the simple question of liability under the circumstances of the case.

In furtherance of justice, therefore, and to provide a more speedy mode of settling questions pertaining to this branch of the public revenue, the Legislature passed the Act of April 11, 1862, Pamphlet Laws, page 492, by which it is provided that the appraiser shall give notice to each person assessed of the class in which he is placed and the amount of his license and the time when the appraiser will hear an appeal. If the person assessed shall fail to attend the appeal, or to appeal from the decision of the appraiser to the court within ten days thereafter, the act declares, he shall not be permitted to set up as a defence to the recovery of the amount of license which he is required to pay, when suit shall be brought for the recovery of the same, either that he is not a dealer or any other ground of defence which might have been heard either by the mercantile appraiser or the court of common pleas on appeal.

The whole matter of laying and collecting public taxes and revenue is regulated and prescribed for by statute, and it has been held many times under the Act of 1862 that those who fail to appeal to the court from the decision of the appraisers within ten

days are perpetually without redress. "Although not subject to the license tax," said President Judge Elwell of Columbia County, in Lamon *vs.* Paxton, 2 Kulp, 259 (1874), "the defendants here did not avail themselves of the mode of redress which the law gave them. By their acquiescence they have waived any defence which they migh' have made, and, therefore, have now no defence."

The Act of 1899 has not attempted to change the law in this respect. The sixth section provides: "He (the appraiser) shall also leave a written or printed notice, to be prepared and furnished by the Auditor General, specifying the classification and amount of license money to be paid by such person to this State, and also the time and place, when and where an appeal will be held as required by law. The appeal shall be held by the county treasurer, acting in conjunction with the mercantile appraiser, at such date as shall conform with law in all counties, except where there is a board of mercantile appraisers, in which case the board shall hear all appeals. Any vender or dealer, subject to the provisions of this act, who is dissatisfied with the rating so made by the mercantile appraiser, shall have the right of appeal to the mercantile appraiser and county treasurer, who are required to hear him on the day so fixed for the appeal; if the vender or dealer is still dissatisfied with the finding of the county treasurer and mercantile appraiser, or

board of appraisers, in reference to the proper classification of said vender or dealer, he shall have the right of appeal to the court of common pleas of the proper county, which appeal the said court is required to hear and determine within twenty days after such appeal shall be taken, or at the next sitting thereof. If any person fails to attend the appeal before the county treasurer and mercantile appraiser, board of appraisers, or the court, he shall not thereafter be permitted, in a suit for the recovery of said mercantile license tax, to set up as a defence, either that he is not a vender or dealer in goods, wares or merchandise, or any other ground of defence, which might have been heard and determined either by said county treasurer and mercantile appraiser, board of appraisers, or the court of common pleas, on appeal, as aforesaid."

The safe method, therefore, to present a defence, or to raise any question, always is to appear before the mercantile appraiser and county treasurer, or before the board of mercantile appraisers, as the case may be, at the time set for appeal; and, if dissatisfied with the finding at such appeal, to appeal from the finding to the court of common pleas.

This method is also a reasonable and convenient one.

The following form of an appeal to the Court of Common Pleas has been in use in the county of Philadelphia.

No. Term, 190

C. P. No.

Commonwealth of Pennsylvania

vs.

APPEAL FROM THE APPRAISERS OF MERCANTILE LICENSES.

Attorney for Appellant, Defendant.

IN THE COURT OF COMMON PLEAS NO.
FOR THE COUNTY OF PHILADELPHIA,
TERM, NO.

APPEAL

of.....

from the decision of the Appraisers of Mercantile Licenses, rating him.....

.....having been rated for the license year commencing May 1, 190 ,..... by the Appraisers of Mercantile Licenses, and having attended the appeal to the Appraisers, and being dissatisfied with the decision of the Appraisers upon such appeal rating him....., hereby appeals from the said decision of the Appraisers to the Court of Common Pleas of Philadelphia County.

PHILADELPHIA COUNTY, *ss.*:

.....being duly.....

says that he is the Appellant in the above appeal, and that the said appeal is not taken for the purpose of delay, but because he verily believes injustice has been done the Appellant.

.....and subscribed before me
this .....day of.....
A.D. 190 .

Notary Public.

It can be readily adapted for use in any other county. The practice has been for the Commonwealth to prepare, file, and serve its statement of demand under the Act of May 25, 1887, Pamphlet Laws, page 271, setting forth the acts of Assembly upon which its demand is based. The appellant, defendant, replies by affidavit of defence. The matter can then be heard by the Judges upon a rule for judgment for want of a sufficient affidavit of defence. Where it is necessary, the Commonwealth, if it desires, may take a rule to plead. The defendant then pleads "*non assumpsit*," and the case is at issue and ready for jury trial. At the trial the Commonwealth must first prove its case. If it does, the defendant then presents his defence. The Court must hear the appeal within twenty days, or at its next sitting. There is the usual appeal to the Superior Court, or to the Supreme Court, as in other cases. No penalty is incurred by the appellant for delay until after the appeal is finally disposed of.

Commonwealth of Pennsylvania *vs.* Potter, 159 Pennsylvania State Reports, 583 (1894).

Sixth.—Defence in Subsequent Suit by the Commonwealth.

In the preceding section upon the subject of appeal, we saw that the provision of the sixth section that "if any person fails to attend the appeal before the county

treasurer and mercantile appraiser, board of appraisers or the court, he shall not thereafter be permitted in a suit for the recovery of said mercantile license tax to set up as a defence, either that he is not a vender of or dealer in goods, wares or merchandise, or any other ground of defence which might have been heard and determined either by said county treasurer and mercantile appraiser, board of appraisers or in the court of common pleas on appeal as aforesaid," as contained in the older act of Assembly, had been strictly adhered to by the courts in many instances.

And it was shown that when applied to questions of the amount of the assessment, of classification, of irregularities, of technicalities, etc., it is consistent with public interests.

Nevertheless there are cases where a person assessed has a right to treat the assessment, with the subsequent proceedings under it, as a nullity and to disregard it; and, afterwards, to present his defence by an affidavit of defence, should an action be brought by the Commonwealth for the amount of the assessment after the time for the statutory appeal has expired, notwithstanding he has not appealed.

Such a case was the case of the Commonwealth of Pennsylvania *vs.* The American Tobacco Company, 173 Pennsylvania State Reports, 531 (1896).

There a corporation of another State, having no factory, store, office or other place of business in the

State of Pennsylvania, but selling goods in this State, was assessed with a mercantile tax as a dealer doing business in this State. The Court of Common Pleas of Philadelphia County gave judgment against the company, for want of a sufficient affidavit of defence; but the Supreme Court reversed the judgment, the late Justice Williams saying: "The learned judge did not put the reasons that influenced his action upon the record and we are left to conjecture as to what they were. It may be that he regarded the assessment of the license tax as wholly unauthorized, but regarded the failure of the defendant to appeal from it as precluding the company from setting up any defence whatever to this action. If the defendant had been a local dealer within the County of Philadelphia, regularly assessed and served with notice, the remedy for any error in the assessment would have been by appeal. If this had been neglected, the defendant would have been precluded by such neglect from defending in this action, for any error or irregularity that could have been reached on an appeal. But the defendant was not subject to assessment by the mercantile appraiser. That officer was without any authority in the premises, and his unauthorized act imposed no liability and no duty on the defendant."

It is always safer and better not to sleep upon one's rights. *Vigilantibus non dormientibus lex subvenit.* Still, as an unconstitutional act is not a law, as it con-

fers no rights and imposes no duties, as it affords no protection and creates no office, as it is in legal contemplation as inoperative as though it had never been passed, it is conceived that citizens have a right to treat proceedings under the Act of May 2, 1899, as nullities and to disregard them.

Whether men, wrongfully claiming to be created agents of the law under that act and wrongfully assuming to act as such agents of the law, can be so treated is probably a more doubtful question, as they may be said to be *de facto*, although not *de jure*, officers. The question of the authority of such men can be better and more safely raised by quo warranto, or by refusal to pay them.

Seventh.—Removal and Habeas Corpus.

The merchant may prepare to leave the State in search of a land of saner statutes, and, if the county treasurer issues an attachment for him, as the Act of 1899 provides that official may, the merchant may speedily have his body within the care and disposition of the courts; for even the upholders of this legislation can scarcely hope successfully to maintain that the mercantile appraisers or the ward constable could declare war, that the county treasurer might suspend the writ of *habeas corpus*.

And it must be borne in mind, in connection with

this subject of removal, that dealers from other States or our own merchants driven out of the State, and so depriving our community of their enterprises, and our people of needed employment, are perfectly free to sell their goods here, in competition with those who can remain, and pay no mercantile tax whatever.

The Commonwealth of Pennsylvania *vs.* The American Tobacco Company, 173 Pennsylvania State Reports, 531 (1896).

Article I, Section 8, of the Constitution of the United States reserves to Congress the right to regulate commerce among the several States.

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